

PETER MERUPI & ANOR

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v.

PP

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CRIMINAL APPEAL NO: Q-05-117-2007]
6 OCTOBER 2010

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CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction and sentence - Appeal against - Intention to cause bodily injury to victim - Whether proved - Injuries suffered by deceased and manner in which injuries were caused - Penal Code, s. 300 - Common intention - Whether proved - Defence - Bare denials - Whether sufficient to raise reasonable doubt upon prosecution's case*

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The appellants were jointly charged with murder under s. 302 of the Penal Code. Both of them were guilty and convicted and sentenced to death by the High Court Judge. Dissatisfied with the decision of the High Court, the appellants filed their appeal to this court. Briefly, the facts were that the deceased had gone out for an outing with his girlfriend, PW4, in the vicinity of the Sarawak State Library. According to PW4, she suddenly felt that she was assaulted from behind, fell and lost her consciousness. Moments later, upon regaining consciousness, she found the deceased nearby, covered under a heap of leaves. PW4 was then again assaulted by a man who robbed her of her ring and tried to rape her. PW4 had resisted the attempts and in the course of the struggle, she tried to wrestle away a stick that was in the hands of the assailant. Due to her persistent resistance, the man then left her and escaped on a motorcycle. PW3 found PW4 and took her to a hospital. PW2, the father of the deceased, was informed of the incident. After searching the vicinity of the State Library for half an hour, PW2 found the deceased, lying in a position with his face facing the ground. The body of the deceased was sent to the General Hospital for a post-mortem. It was concluded that the cause of death was bilateral subdural and subarachnoid haemorrhage with fracture of skull due to blunt object. In the course of police investigations (1) PW4 identified at the identification parade the first appellant as the man

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- A who assaulted, robbed and tried to rape her on that fateful evening;
(2) identified a stick (exh. P34A) as the one she was struggling with and it was revealed that the said stick was recovered from the house of the second appellant.
- B **Held (dismissing the appeals; affirming the convictions and sentences)**
Per Mohamed Apandi Ali JCA delivering the judgment of the court:
- C (1) Any assailant, who assaulted the victim with a blunt object (like
exh. P34A) at the back of the head, must have had the
intention to cause bodily injury to that victim. And when the
assault was done with such a great force that caused fracture of
the skull, surely it was done with the knowledge and intention
D to cause such a bodily injury that was sufficient in the ordinary
course of nature to cause death. Alternatively, the assailant
knew that such an act (of hitting at the back of the head) was
imminently dangerous that it must in all probability cause death
or such bodily injury as was likely to cause death and it was
done without any excuse. (para 22)
- E (2) The injuries suffered by the deceased and the manner the
injuries were caused in this case, fell within the third and fourth
limbs of s. 300 of the Penal Code. Further, common intention
had been proved by the fact that the weapon used in the
commission of the murder (the stick, exh. P34A) was the very
F one identified by PW4 and subsequently by the first appellant;
and it was recovered from the house of the second appellant.
(paras 24 & 25)
- G (3) The defence by both appellants had been bare denials. Such
denials when tested with the evidence as a whole and without
any other proof were insufficient to raise any reasonable doubt
upon the prosecution's case. Instead of casting reasonable
doubt, the first appellant's story of blaming the second appellant
H for the crime, further cemented the prosecution's case. (para 26)
- I (4) From the totality of the evidence, the prosecution had proven
its case beyond reasonable doubt. As the finding of the trial
court depended on an assessment of the credibility and
reliability of the victim witness, it was not the practice of the
Appeal Court to refuse to accept it. Therefore, there was no
reason to disturb the High Court's finding. (paras 27 & 28)

Bahasa Malaysia Translation Of Headnotes

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Perayu-perayu dituduh bersama atas kesalahan pembunuhan di bawah s. 302 Kanun Keseksaan. Kedua-duanya didapati bersalah dan disabit dan dihukum mati oleh Hakim Mahkamah Tinggi. Tidak puas hati dengan keputusan Mahkamah Tinggi, perayu-perayu memfailkan rayuan ke mahkamah ini. Secara ringkas, fakta-fakta adalah bahawa simati telah bersiar-siar dengan teman wanitanya, PW4, di kawasan Perpustakaan Negeri Sarawak. Menurut PW4, beliau tiba-tiba terasa bahawa beliau diserang dari belakang, terjatuh dan tidak sedarkan diri. Kemudiannya, apabila PW4 sedar diri, beliau mendapati simati berdekatan, diliputi setimbun daun-daun. PW4 lagi sekali diserang oleh seorang lelaki yang telah merompaknya dengan mengambil cincinnya dan cuba merogolnya. PW4 telah melawan balik dan dalam proses pergelutan, PW4 cuba merampas sebatang kayu yang dipegangi penyerang. Disebabkan PW4 dengan sedaya upaya mempertahankan dirinya, lelaki itu meninggalkannya dan melarikan diri dengan motorsikal. PW3 telah menjumpai PW4 dan membawanya ke hospital. PW2, bapa kepada simati, diberitahu mengenai kejadian tersebut. Selepas mencari sekitar Perpustakaan Negeri tersebut, PW2 menjumpai simati, dalam keadaan meniarap dengan mukanya menghadapi tanah. Mayat simati dihantar ke Hospital Besar untuk dibedah siasat. Ia putusan bahawa sebab kematian adalah dua hala pendarahan subdural dan subaraknoid dengan retakan kepala disebabkan benda tumpul. Dalam menjalankan siasatan polis (1) perayu mengenalpasti di perbarisan pengecaman perayu pertama sebagai lelaki yang telah menyerang, merompak dan mencuba untuk merogolnya pada hari kejadian tersebut; (2) perayu mengenalpasti sebatang kayu (exh. P34A) sebagai batang kayu yang digunakan semasa pergelutan dan ia telah didedahkan bahawa batang kayu tersebut ditemui di rumah perayu kedua.

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Diputuskan (menolak rayuan-rayuan; mengesahkan sabitan dan hukuman)**Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:**

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- (1) Penyerang, yang menyerang mangsa dengan benda tumpul (seperti exh. P34A) pada bahagian belakang kepala, mesti mempunyai niat untuk menyebabkan kecederaan kepada badan mangsa. Dan apabila serangan dilakukan dengan begitu kuat sehingga meretakkan kepala, ia mesti dilakukan dengan pengetahuan dan niat untuk menyebabkan kecederaan kepada

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- A badan yang di dalam keadaan biasa mencukupi untuk mengakibatkan kematian. Secara alternatif, penyerang juga berpengetahuan bahawa tindakan seperti itu (memukul seseorang pada bahagian belakang kepala) adalah merbahaya dan mesti berkemungkinan besar mengakibatkan kematian atau
- B kecederaan pada badan mangsa yang boleh mengakibatkan kematian dan ia dilakukan tanpa apa-apa alasan.
- (2) Kecederaan yang dialami simati dan cara kecederaan dilakukan di dalam kes ini, terjatuh dalam cabang ketiga dan keempat s. 300 Kanun Keseksaan. Seterusnya, niat bersama telah
- C dibuktikan oleh fakta bahawa senjata yang digunakan semasa pembunuhan (sebatang kayu, exh. P34A) adalah yang telah dikenalpasti oleh PW4 dan seterusnya oleh perayu pertama; dan ia ditemui di rumah perayu kedua.
- D (3) Pembelaan kedua-dua perayu hanya penafian semata-mata. Penafian-penafian tersebut apabila diuji dengan keterangan secara keseluruhannya dan tanpa apa-apa bukti yang lain tidak memadai untuk membangkitkan keraguan munasabah ke atas kes pendakwaan. Daripada membangkitkan keraguan munasabah,
- E perayu pertama telah menyalahkan perayu kedua bagi kesalahan tersebut, dan ini telah menguatkan lagi kes pendakwaan.
- (4) Dari penilaian secukupnya keseluruhan keterangan, pihak pendakwaan berjaya membuktikan kesnya melampaui keraguan munasabah. Penemuan mahkamah perbicaraan bergantung pada
- F taksiran kredibiliti dan kebolehpercayaan saksi-saksi mangsa, ia bukanlah amalan satu Mahkamah Rayuan untuk menolaknya. Oleh itu, tiada alasan untuk mengganggu keputusan Mahkamah Tinggi.
- G **Case(s) referred to:**
Balachandran v. PP [2005] 1 CLJ 85 FC (*refd*)
Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC (*refd*)
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC (*refd*)
Lee Kwai Heong & Anor v. PP [2006] 1 CLJ 1043 CA (*refd*)
- H *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 CA (*refd*)
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC (*refd*)
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC (*refd*)
- Legislation referred to:**
- I Criminal Procedure Code, ss. 180, 182A, 402A
 Penal Code, ss. 34, 302
 Rules of the Court of Appeal 1994, r. 59(2)

For the 1st appellant - Wit Malang; M/s Wit & Co

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For the 2nd appellant - Ignatius Melaka Nisau; M/s Wit & Co

For the respondent - Awang Armadajaya Awang Mahmud DPP; AG's Chambers

[Appeal from High Court, Kuching; Criminal Trial No: 45-05-2005-II]

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Reported by Suhainah Wahiduddin

JUDGMENT

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Mohamed Apandi Ali JCA:

Introduction

[1] The appellants were jointly charged with murder under s. 302 of the Penal Code. Both of them were found guilty and convicted and sentenced to death by the learned judge of the High Court. The charge against them reads as follows:

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That you, jointly, with one other still at large, on the 16th day of November, 2004, at about 7:30 p.m. at a spot on the grass verge near the State Library, Petra Jaya, Kuching, in the state of Sarawak, in furtherance of the common intention of you all, committed murder by causing the death of Mazlan bin Sapiee (M), 22 years old, and you thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the same code.

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[2] Dissatisfied with the decision of the High Court, the appellants filed their appeal to this court. The appeal was dismissed on 29 June 2010 whereby the convictions and sentences by the High Court were affirmed. We now give our reasons for our unanimous decision in dismissing the appeal.

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The Notice Of Appeal

[3] Before proceeding with the merits of the appeal, we have to note our observation that the Notices of Appeal filed by the appellants were actually against sentence only! (refer pp. 346 - 347 of the Appeal Records). The forms that were used to file the said Notices of Appeal are the normal Form 5 in the First Schedule to Rules of the Court of Appeal 1994. We also note that since the two appellants were convicted and sentenced to death, at the material time of filing the Notice of Appeal, both of them were in prison.

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- A Under such circumstances, it would be more appropriate to file such notice of appeal, by using Form 6, as provided for under r. 59(2) Rules of the Court of Appeal 1994. To our mind, the officer in charge of the prison ought to have explained to both appellants of their rights to appeal against conviction and sentence particularly in
- B cases that carried capital punishment. It is beyond comprehension for any convicted person who has been sentenced with a sole mandatory sentence of death for an offence under s. 302 of the Penal Code to be appealing against sentence only. This indeed is an absurd situation.
- C [4] Bearing in mind that absurdity, of which the appellants may be blameless, we feel that there will be a miscarriage of justice, if we were to apply our minds solely on the issue of sentence. We shall not be blinkered by such technicalities. No doubt it would
- D have been easier for us. But common sense prevailed, and we proceeded to hear the appeals on the basis that they were appeals against conviction and sentence.

Facts Of The Case

- E [5] The facts of the case as unfolded from the evidence of prosecution witnesses are as follows:
- F [6] On the late evening of 16 November 2004 Mazlan bin Sapiee (the deceased), a young man of 22 years old, went out for on outing with his girlfriend, Dayang Khairulnisa bt Nasron (PW4). It was the 3rd day of Hari Raya and both of them were dressed for the occasion. Prior to that they visited mutual friends and relatives. They went about on a motorcycle ridden by Mazlan. For their
- G outing on that fateful day and time, they went to the vicinity of the Sarawak State Library, a serene place, favoured by joggers for its green and hilly terrain with shady trees.
- H [7] At that place, Dayang Khairulnisa (PW4) suddenly felt that she was assaulted from behind. She fell and lost her consciousness. Moments later, upon regaining consciousness, she found that she was covered under a heap of leaves. She started looking for Mazlan and found him nearby, also covered under a heap of leaves. As Dayang Khairulnisa (PW4) tried to move Mazlan she was again assaulted. The assailant was a man. The assailant robbed her of her

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ring and stripped her and carried her on his shoulders to some distance away and upon putting her down on the grass, he tried to rape her. Dayang Kharulnisa resisted the attempts and in the course of the struggle, she tried to wrestle away a stick that was in the hands of the assailant. Due to her persistent resistance, the man then left her and escaped on a motorcycle.

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[8] Dayang Khairulnisa then managed to crawl and walk towards the main road, to get help. A woman who saw her walking in an unsteady manner, stopped to help. This woman, Rosmaizah Bte Roslan (PW3) turned out to be Dayang Khairulnisa's friend. Dayang Khairulnisa (PW4) related to Rosmaizah (PW3) what happened to her and her boyfriend. Rosmaizah took Dayang Khairulnisa to the Sarawak General Hospital. And before she was wheeled into the Emergency Room Dayang Khairulnisa gave Rosmaizah a telephone number for her to contact to inform of the incident.

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[9] Rosmaizah then called the number and informed the person at the end of the line as to what had happened to Dayang Khairulnisa and Mazlan. The person at the end of the line is Mazlan's father, Sapiee bin Suip (PW2). Upon being so informed of the incident, Sapiee (PW2) quickly lodged a police report *vide* Gita Report No. 5760/04 (exh. P7). As a concerned father, Sapiee then went to look for his son at the vicinity of the State Library. This was about 9.45 pm. Upon failing to find him there, he proceeded to the Hospital to see Dayang Khairulnisa. After seeing Dayang Khairulnisa, PW2 once again went to look for his son. After searching for about 1/2 hour PW2 found his son, Mazlan. Mazlan was found dead within the grounds of the Sarawak State Library, lying in a position, with his face facing the ground. Sapiee (PW2) then lodged another police report, *vide* Gita Report No. 5761/04 (exh. P8).

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[10] The police arrived at the scene of crime, soon after PW2 found the body of his son, Mazlan. The police then cordoned the area and police investigations, led by ASP Bond Lian Min (PW8) commenced. The body of Mazlan bin Sapiee was sent to the General Hospital for a post-mortem. Dr. Jamil bin Kolkadir (PW10) conducted the post-mortem on 18 November 2004. PW10 concluded that the cause of death was *bilateral subdural and subarachnoid haemorrhage with fracture of skull* due to blunt object.

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- A [11] In the course of police investigations, an identification parade was conducted by Insp. Fauzan bin Abu Kassim (PW5). This was conducted on 3 December 2004, about two weeks after the murder incident. At the identification parade, Dayang Khairulnisa (PW4) identified Peter Merupi (the 1st appellant) as the man who
- B assaulted, robbed and tried to rape her on that evening of 16 November 2004 at the vicinity of the Sarawak State Library. In her evidence, PW4 also identified a stick (exh. P34A) as the one that she was struggling with, in her attempts to take it away from her assailant, Peter Merupi (the 1st appellant). It was revealed that
- C the stick (P34A) was recovered from the house of Zen bin Ali (the 2nd appellant) in the course of police investigations, on 10 December 2004. The stick was recovered in the presence of the two appellants, when the house was searched by C/Insp. Solinient Nyian (PW9).

D **Findings At the End of Prosecution's Case**

- [12] At the end of the case for the prosecution, the learned trial judge made a ruling that pursuant to the provisions of s. 180 of the Criminal Procedure Code a *prima facie* case has been made out
- E against both appellants on the charge preferred against them and accordingly they were directed to enter their defence.

- [13] Upon perusal of the Appeal Records, including the grounds of judgment, it is clear that the learned trial judge has religiously
- F followed what was required of her pursuant to s. 180 of the Criminal Procedure Code. The trial judge had laboured over the evidence adduced by the prosecution and had adopted the correct approach when she referred to and relied on the authorities of *PP v. Mohd. Radzi Abu Bakar* [2006] 1 CLJ 457; *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; and *Balachandran v. PP* [2005] 1 CLJ 85.
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- [14] The learned trial judge had also correctly identified the essential ingredients of the offence under s. 302 of the Penal Code. Having so identified the essential ingredients, the trial judge had
- H analysed all the evidence of the prosecution witnesses. This can be seen from her grounds of judgment (from pp. 3 to 23 of the Appeal Record).

- [15] On the elements of common intention, under s. 34 of the Penal Code, the trial judge in evaluating the evidence, had correctly
- I relied on the principles as enunciated in the Court of Appeal case of *Lee Kwai Heong & Anor v. PP* [2006] 1 CLJ 1043.

[16] In this case, the 2nd appellant had given a notice of *alibi* under s. 402A of the Criminal Procedure Code. It was dated 30 May 2006, well before the commencement of the trial on 16 June 2006. However the prosecution had successfully demolished such defence, by calling Zaiton bte Bujang (PW11). PW11 is the second wife of the 2nd appellant. The trial judge had evaluated the evidence of PW11 and from evidence adduced had rightly dismissed the defence of *alibi*.

Findings At The End Of The Trial

[17] Both appellants elected to give evidence on oath. The 1st appellant came up with a bizarre story. He testified that on that day, there were three of them who went to the vicinity of the State Library. He was accompanied by one Edwin and the 2nd appellant. He told the court that while on a hill within the vicinity of the State Library, the 2nd appellant had administered drugs upon himself. After about half hour, the 2nd appellant took out a stick (identified by the 1st appellant as exh. P34A) from his motorcycle and went down the hill. The 1st appellant and Edwin were then, still on the hill. Both of them then heard a lady's voice calling for help. Both of them went down the hill and saw the 2nd appellant in the act of hitting (assaulting) a man with the stick (exh. P34A). The 2nd appellant then ran away and rode on his motorcycle. Both of them, the 1st appellant and Edwin then followed suit.

[18] The 2nd appellant, in his evidence, denied the story as narrated by the 1st appellant. He denied being together with the 1st appellant on the day and time and place of the incident. He could not give any reason as to why the 1st appellant was accusing him of assaulting the deceased. He admitted that the stick (exh. P34A) was his, and that it was recovered from his house.

[19] At the end of the trial, the learned trial judge had followed what was required of her, pursuant to s. 182A of the Criminal Procedure Code. She wrote, in her grounds as follows:

At the close of the defence case, on the totality of the evidence, I find that the 1st Accused and the 2nd Accused have failed to raise a reasonable doubt on the Prosecution's case and that the Prosecution has proved its case against both the Accused beyond reasonable doubt. In the circumstances, I find the 1st Accused and the 2nd Accused guilty and convict them as charged. I hereby impose the only sentence provided by the law ie, sentence the 1st Accused and the 2nd Accused to death and they are to be hung by the neck till they are dead.

A Our Findings

B [20] Upon perusal of the Appeal Records and upon hearing submissions by both parties, we find that this case evolved over factual matters. It is also clear that the finding of fact made by the trial judge turned solely on the credibility of witnesses. There are not much of legal issues involved in this appeal. It is trite law that an appellate court should be very slow in disturbing the findings of the trial judge. On this well established principle, it is suffice to cite a few cases such as:

C *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197;
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1.

D [21] However for completeness, we have to state that upon evaluation of the evidence, we also conclude that the appellants had jointly committed the offence of murder. We use the very same words used by Lord Chief Justice (Malaya) Raja Azlan Shah (as he then was) in *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159:

E In the present appeal we think that in view of the nature of the injuries sustained by the deceased and the time and place of the incident, there was evidence of intention on the part of the appellants to cause bodily injury to the deceased.

F The cause of death in this appeal, as explained by the pathologist is:

Bilateral subdural and subarachnoid haemorrhage with fracture of skull due to blunt object.

G [22] Any assailant, who assaulted the victim with a blunt object (like exh. P34A) at the back of the head, must have had the intention to cause bodily injury to that victim. And when the assault was done with such a great force that caused fracture of the skull, surely it was done with the knowledge and intention to cause such a bodily injury that is sufficient in the ordinary course of nature to cause death. Alternatively the assailant knew that such an act (of hitting at the back of the head) is imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and it was done without any excuse.

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[23] Any human being is aware that the neck and head area is a vulnerable part of the body and that any injury to that part of the body would have been fatal. A

[24] The injuries suffered by the deceased and the manner the injuries were caused in this case, fall within the 3rd and 4th limbs of s. 300 of the Penal Code. B

[25] Last, but not least, common intention has been proved by the fact that the weapon used in the commission of the murder (the stick, exh. P34A) was the very one identified by PW4 and subsequently by the 1st appellant; and it was recovered from the house of the 2nd appellant. C

[26] The defence by both appellants has been bare denials. Such denials when tested with the evidence as a whole and without any other proof are insufficient to raise any reasonable doubt upon the prosecution's case. Instead of casting any reasonable doubt, the 1st appellant's story of blaming the 2nd appellant for the crime, further cemented the prosecution's case. D

[27] From the totality of the evidence, we are satisfied that at the end of the trial, the prosecution had proven its case beyond reasonable doubt. As the finding of the trial court depended on an assessment of the credibility and reliability of the victim witness, it is not the practice of the Appeal Court to refuse to accept it. E

[28] There is therefore no reason for us to disturb the High Court's finding. We have no difficulty in dismissing the appeals by the appellants. The convictions and sentences by the High Court are affirmed. F

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